83-2101

NO.

Office - Supreme Court, U.S.
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ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

HOWARD A. DANIEL,

Petitioner,

vs.

OFFICE OF PERSONNEL MANAGEMENT,

Respondent.

PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Whether the Court of Appeals for the Federal Circuit has jurisdiction under 5 U.S.C. 8347(c) and 5 U.S.C. 7703 to review decisions of the Merit Systems Protection Board denying federal employees disability annuity benefits[1].

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1. The parties below are reflected in the caption: Howard A. Daniel and the Office of Personnel Management.

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OPINION BELOW

The February 17, 1984 opinion of the Court of Appeals, not reported, appears in the Appendix.

JURISDICTION

The judgment of the Court of Appeals for the Federal Circuit was entered on February 17, 1984. A timely petition for reconsideration and rehearing en banc was denied on March 6, 1984. This petition for certiorari was filed within ninety days from that date. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254(1).

STATEMENT OF THE CASE

This case originated with the United States Office of Personnel Management (OPM), which denied Petitioner's claim for a disability annuity under the retirement system established for federal employees. Petitioner sought administrative review

of the denial by filing an appeal with the Merit Systems Protection Board (MSPB), which concurred in the result reached by OPM. Petitioner then sought judicial review of the determinations in the Court of Appeals for the Federal Circuit under 5 U.S.C. 7703.

Federal employees with five years of creditable service are entitled to disability retirement if they become unable, because of disease or injury, to provide useful and efficient service in their present positions and if they are not qualified for reassignment to certain other positions. 5 U.S.C. 8337(a). If, after an employee applies for disability retirement, the agency-employer cannot reassign him, the application is submitted to OPM, which administers the federal retirement system, and which may then approve or deny the claim. An employee whose application is denied, after reconsideration, may appeal to MSPB, which will provide the employee a de novo hearing to contest the OPM determination. 5 U.S.C. 8347(d); 5 U.S.C.

7701.

Petitioner Howard A. Daniel, a Postal Service craft worker, applied for disability retirement on July 31, 1979. Following administrative reconsideration, his application was disapproved by OPM on June 23, 1982 for lack of evidence of total disability. Mr. Daniel then appealed pro se to the MSPB which, after a hearing, denied his appeal in an initial decision issued by a presiding official on February 9, 1983. Petitioner requested the full Board to review the initial decision, but that request was denied on July 6, 1983. At the final page of the Board's initial decision, Petitioner was advised[1]:

> Pursuant to 5 USC 7703(b)(1) 23/, the appellant has the right to seek judicial review of the Board's final decision in this appeal. A petition requesting such review must be filed with the United States Court of Appeals for the Federal Circuit no

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1. Initial Decision, at p. 13; App.. A-47.

later than thirty (30) days after appellant's receipt of the Board's final decision or order.

23/ As modified by Section 127 of the Federal Court Improvement Act of 1982, to be codified at 28 U.S.C. Section 1295(a)(9).

Petitioner sought judicial review, pro se, in the Court of Appeals for the Federal Circuit. He complained there of substantive and procedural error by OPM and MSPB. Petitioner there asserted that the MSPB should have deferred to findings of the Federal Office of Workers' Compensation Programs that he had suffered job-related disabling injuries; Petitioner also asserted that his separation from the Postal Service had been involuntary; that the Postal Service violated union contractual rights relating to treatment and placement of ill, injured, and disabled employees which the MSPB was responsible for enforcing through the administrative appeals process; that the MSPB improperly evaluated medical evidence; and that the MSPB improperly relied on an allegedly falsified and biased report from an

OPM examining physician. The Circuit Court dismissed his appeal on February 17, 1984 for lack of jurisdiction[2]. Rehearing and reconsideration were denied on March 6, 1984[3].

In its decision of February 14, 1984, the Court below held[4]:

> With regard to disability retirement applications, this court has jurisdiction only over appeals of involuntary mental disability cases. Henderson v. Office of Personnel Management, No. 83-1139 (Fed. Cir. Dec. 21, 1983). Petitioner's suggestion that his application for disability retirement for physical reasons was involuntary, is therefore irrelevant. The above-captioned case is therefore dismissed.

The Federal Circuit decision in Henderson v. Office of Personnel Management, 724 F.2d 119 (1983), held that no judicial review was available for

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2. Appeal No. 83-1354; App., A-1.

3. Appeal No. 83-1354; App., A-55.

4. Decision, at p. 2.

denied physical disability retirement claims based upon either voluntary (employee-initiated) or involuntary (agency-initiated) applications; review authority was limited, it was held, to agency-initiated actions resulting in retirement for mental disability. Henderson relied upon the Federal Circuit's en banc ruling in Lindahl v. Office of Personnel Management, 718 F.2d 391 (1983). The Court's rulings in the instant case and in Henderson and Lindahl were, we submit, erroneous.

REASONS FOR GRANTING THE WRIT

THE DECISION BELOW DENIES FEDERAL EMPLOYEES THE RIGHT TO JUDICIAL REVIEW OF DENIALS OF THEIR FEDERAL RETIREMENT BENEFITS

The availability of judicial review affects the retirement claims of tens of thousands of federal employees[5]. About 2.7 million active Federal workers participate in the civil service retirement program, and about 1.2 million former civil servants and 428,000 survivors receive civil service retirement benefits[6]. Within the retirement system, many claims involve disabled employees.

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5. Although this case involves the review of a finding that an individual was not qualified for disability retirement, the reasoning and result below would apply equally to a denial of regular longevity retirement.

6. Comptroller General Report: Action Needed to Eliminate Delays In Processing Civil Service Retirement Claims, at p. 1 (1981)

At the end of fiscal year 1982, OPM was paying 348,500 civil service disability annuitants annual benefits of about $3.5 billion—almost 20 percent of the total amount paid to retired employees[7]. OPM adjudications on retirement cases, if unfavorable to the employee, are subject to review by the Merit Systems Protection Board[8]. Disability retirement determinations are especially significant to ill and injured federal employees who depend upon the annuities as their primary source of income.

An employee on the one hand can be discharged by his employer-agency for not being physically fit

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7. Comptroller General Report GAO/FPCD-83-1 (April 13, 1983), at p. 1.

8. There are three basic adjudications: (1) whether an individual is disabled and entitled to any annuity; (2) whether, having received an annuity, an individual is sufficiently recovered to warrant restoration to duty and discontinuance of the annuity; (3) whether an individual's earning capacity has been sufficiently restored following disability to warrant discontinuation of his annuity. The administrative litigation in each case proceeds through the same channels. This case involves only the first determination.

to perform his job, yet can be denied a disability annuity by OPM for failing to demonstrate an inability to perform his job, leaving the employee with no income. Under the decision of the Court of Appeals for the Federal Circuit, these inconsistent results allow the employee no opportunity for judicial review of the disability denial. This was not the intent of Congress.

5 U.S.C. 8337(a) establishes an annuity for an employee with five years of civilian service who is unable to render useful and efficient service in the employee's position and who is not qualified for reassignment to a vacant position at the same grade or level in which the employee could perform useful and efficient service. Section 8347(d) of Title 5 of the Code provides for an administrative appeal to the MSPB from an OPM determination on a disability application.

In 1981 there were 5,610 decisions at the MSPB regional level, of which 967 involved appeals of disability determinations[9]. In 1982 there were 406 appeals by employees from unfavorable OPM disability retirement decisions[10].

The volume of retirement applications and related appeals, and the significance of the administrative determinations to the individuals involved, coupled with a strong presumption of the availability of judicial review of administrative determinations relating to basic economic entitlements, suggest that courts would afford at least some review of administrative denials of entitlement claims. That review has in fact existed for many years prior to decision by the court below. That court disregarded precedent and misconstrued applicable legislation

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9. A Report of MSPB Office of Merit Systems Review and Studies, December 1982, pp. 24-25.

10. A Report of the U.S. Merit Systems Protection Board Office of Merit Systems Review and Studies, December, 1983, Ex. 1, p. 13; Ex. 6, p. 24.

when it determined that no judicial review was available for individuals whose disability retirement claims had been denied by the Office of Personnel Management and the Merit Systems Protection Board.

THE DECISION OF THE COURT BELOW IS CONTRARY TO OPINIONS OF FIVE OTHER CIRCUITS AND THE CLAIMS COURT GRANTING JUDICIAL REVIEW OF RETIREMENT DECISIONS. BY LIMITING ITS APPELLATE JURISDICTION THE COURT BELOW WILL FRAGMENT REVIEW OF RETIREMENT CLAIMS AND RENEW CIRCUIT CONFLICTS

There have been sharply divergent opinions and results in the circuit courts concerning judicial review of OPM and MSPB disability retirement determinations prior to the centralization of personnel litigation in the Federal Circuit. Within the Federal Circuit opinion is divided concerning judicial review rights, which the majority holds do not exist. If the current position of the Federal Circuit is maintained, litigants will seek non-statutory review under the APA in the district courts, likely leading to renewed and continuing division of the circuits.

5 U.S.C. 8347(c) defines OPM retirement decisions as final, conclusive, and not subject to review. 5

U.S.C. 8347(d) establishes an appeal from OPM retirement decisions to MSPB. 5 U.S.C. 7701 governs MSPB hearing and adjudication procedures for all employee appeals. 5 U.S.C. 7703 allows any employee the opportunity for judicial review of an MSPB final order or decision. Prior to the Federal Courts Improvement Act, P.L. 97-164 (effective October 1, 1982), review of Board decisions was obtained in any federal circuit court or the Court of Claims. Review is now obtained exclusively in the Federal Circuit[11].

Until 1980, review procedures for disability retirement cases were established at 5 U.S.C. 8347(c), (d), which said:

> (c) The Office shall determine questions of disability and dependency arising under this chapter. The decisions of the Office concerning these matters are final and conclusive and are not subject to review. The

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11. 5 U.S.C. 1295(a)(9); 96 Stat. 45, Sec. 144, 5 U.S.C. 7703.

> Office may direct at any time such medical or other examinations as it considers necessary to determine the facts concerning disability or dependency of an individual receiving or applying for annuity under this subchapter. The Office may suspend or deny annuity for failure to submit to examination.
>
> (d) An administrative action or order affecting the rights or interests of an individual or of the United States under this subchapter may be appealed to the Merit Systems Protection Board under procedures prescribed by the Board.

For many years, the Court of Claims and other courts had construed section 8347(c) to permit limited judicial review of OPM retirement decisions. Under Scroggins v. United States, 148 Ct.Cl. 530, 397 F.2d 295 (1968), cert. den. 393 U.S. 952 (1968), review was allowed "where there has been a substantial departure from important procedural rights, a misconstruction of the governing legislation, or some like error going to the heart of the administrative determination." Id. at 297.

5 U.S.C. 8347 was modified in 1980 to continue the "finality" clause and to add an exception to the

clause:

(c) The Office shall determine questions of disability and dependency arising under this subchapter. Except to the extent provided under subsection (d) of this section, the decisions of the Office concerning these matters are final and conclusive and are not subject to review. The Office may direct at any time such medical or other examinations as it considers necessary to determine the facts concerning disability or dependency of an individual receiving or applying for annuity under this subchapter. The office may suspend or deny annuity for failure to submit to examination.

(d)(1) Subject to paragraph (2) of this subsection, an administrative action or order affecting the rights or interests of an individual of the United States under this subchapter may be appealed to the Merit Systems Protection Board under procedures prescribed by the Board.

(2) In the case of any individual found by the Office to be disabled in whole or in part on the basis of the individual's mental condition, and that finding was made pursuant to an application by an agency for purposes of disability retirement under section 8337(a) of this title, the procedures under section 7701 of this title shall apply and the decision of the Board shall be subject to judicial review under section 7703 of this title.

Petitioner's case post-dated the 1980 amendment. When he sought judicial review in the Federal Circuit from an adverse Board decision, his appeal was dismissed for lack of appellate jurisdiction on the basis of that Circuit's decision in Henderson v. Office of Personnel Management, 724 F.2d 119 (1983), which relied upon Lindahl v. Office of Personnel Management, 718 F.2d 391 (Fed. Cir. 1983).

In Lindahl the court held that the "finality" clause of 5 U.S.C. 8347(c) precludes any judicial review of disability retirement decisions[12]. The same result has been reached by the Eighth Circuit, in Morgan v. Office of Personnel Management, 675 F.2d 196 (1982); and in the Sixth Circuit, Hackett v. Office of Personnel Management, 721 F.2d 580 (1983). The majority opinion in Lindahl, an en banc

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12. The holding in Lindahl extends to employee-initiated claims of either physical or mental disability. Henderson v. Office of Personnel Management, 724 F.2d 119 (Fed.Cir. 1983).

decision, rejected the views of four dissenting circuit judges and rejected earlier decisions of the Court of Claims, the Ninth, Eleventh, Tenth, Third, and District of Columbia Circuits. Lindahl, held[13] that:

> Treatment of 5 U.S.C. 8347(c) in the courts since 1956 seems to have been influenced by an apparent tendency to resolve doubt in favor of assuring federal court review of every conceivable objection to agency action. The tendency has on occasion served well the paramount public interest in the administration of justice, and has avoided a slamming of the federal courthouse door in the face of persons entitled to be there. Courts should be equally zealous in avoiding the unauthorized jamming of the courthouse door. Persons entitled to be there are harmed when denied or delayed entry by a crowd which is there not because a constitutional right is involved, or because a statute provides a right to be there, but only because a court has adopted an overly expansive view of its own jurisdiction.

Federal Circuit Judge Davis summarized the

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13. 718 F.2d at 396.

dissenting views and those of the other circuit courts according judicial review to disability adjudications, stating at 718 F.2d 406:

> The core of it is that (a) the standard of narrow judicial review had been utilized for many years when Congress considered the 1980 amendment; (b) Congress was made quite aware of that standard during its consideration of the 1980 amendment; (c) the whole focus of the Congressional consideration was the over-narrowness of that standard for involuntary mental disability cases; (d) no one seems to have suggested that, for other types of disability cases, the existing standard should be lessened or all review abolished (indeed, the then Director of OPM expressly told Congress that the prior standard would continue for non-mental disability cases, see Turner v. OPM, supra, 707 F.2d at 1503-04); (e) there is nothing in the Committee reports or the floor discussion suggesting that the prior judicial standard was no longer to be followed in the non-mental area; and (f) no change was made in the wording of the "finality" clause (except for the special provision for mental disability and express authorization for review by the MSPB).
>
> In the face of that history, it is hard for me to think that, in explicitly expanding review for mental cases, Congress silently withdrew for

non-mental cases the limited judicial review that had long been allowed. To paraphrase what the Supreme Court said in Merrill, Lynch, Pierce, Fenner & Smith v. Curran, 456 U.S. 353, 381-2 (1982) (a recent Supreme Court decision holding that the reenactment and enlargement of another federal statute had incorporated a prior judicial gloss): "it is abundantly clear" that the Scroggins standard "was a part of the 'contemporary legal context' in which Congress legislated" in 1980. "In that context the fact that a comprehensive reexamination and significant amendment" of the disability retirement legislation "left intact the statutory provisions under which the federal courts" had developed and used the Scroggins standard "is of itself evidence that Congress affirmatively intended to preserve that remedy." When the "finality" language was retained and embodied in the 1980 amendment, that language carried with it the existing judicial interpretation.

In his dissent in Lindahl, Judge Smith said[14]:

I have already noted that the majority too easily implies a total lack of judicial review for voluntary retirees in physical disability cases, notwithstanding the fact that in almost a quarter century of experience under the Scroggins formula there has been

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14. 718 F.2d at 409-410.

> no jamming of the courthouse door by the few fingers that have grasped it.

Prior to the Federal Courts Improvement Act, which centralized most federal personnel litigation in the Federal Circuit, other circuits, considering the intent of the framers of section 8347(c), held that it provided limited judicial review to employees whose disability claims were disapproved by the Office of Personnel Management and the Merit Systems Protection Board. In Parodi v. Merit Systems Protection Board, 690 F.2d 731 (9th Cir. 1982), the court determined that 5 U.S.C. 7703 adopted the Scroggins standard of review, holding that "under the so-called Scroggins rule, courts treat section 8347(c) as limiting, rather than barring, judicial review otherwise provided by section 7703(c)," a result consistent with the presumption favoring judicial review of agency actions absent clear and convincing evidence of a congressional

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15. Dunlop v. Bachowski, 421 U.S. 560, 567 (1975); Abbott Laboratories v. Gardner, 387 U.S. 136, 141 (1967)

intent to bar all judicial review of disability determinations[15]. The court stated, 690 F.2d, at 735:

> The language of section 8347(c) does not provide clear and convincing evidence of a congressional intent to bar all judicial review of disability determinations. The statute only evinces a congressional intent to bar judicial review of factual questions concerning disability and dependency. [4]

> [4] Had Congress wished to preclude judicial review of both factual and legal questions, Congress could have so provided. See 38 U.S.C. 211(a) as it read prior to its 1970 amendment. ([D]ecisions of the Administrator on any questions of law or fact concerning a claim for benefits or payments under any law administered by the Veterans' Administration shall be final and conclusive and no other official or any court of the United States shall have power or jurisdiction to review any such decision.)

Noting that the Office of Personnel Management had advised Congress in connection with the 1980 amendments, the Court observed in Parodi, at 690 F.2d, p. 736:

> We believe it is reasonable and proper to restrict expanded judicial review to involuntary disability retirements. An employee who voluntarily applies for disability retirement seeks to establish title to a benefit granted by law; the Office of Personnel Management is the administrative agency charged under the law with the managerial function of adjudicating disability retirement claims. It is appropriate, therefore, that OPM decisions on voluntary applications be conclusive, reviewable only to determine whether there has been a substantial procedural error, a misconstruction of governing legislation, or some like error going to the heart of the administrative determination.

The Eleventh Circuit followed Parodi in McCard v. Merit Systems Protection Board, 702 F.2d 978 (1983). The Tenth Circuit, concurring with Parodi in Pitzak v. Office of Personnel Management, 710 F.2d 1479 (1983), held that the sections 8347(c) and 7703 were capable of coexistence:

> It is possible to give effect to Congress' obvious intent to foreclose judicial review of the sufficiency of the medical evidence in these cases, yet preserve the generally recognized duty of the courts to require a governmental agency to follow the procedural and substantive framework established in the act the agency administers and to prevent the agency from violating constitutional rights. See Dunlop v. Bachowski, 421 U.S. 560, 567-68 (1975).

The Fourth Circuit, in Chase v. Office of Personnel Management, 695 F.2d 790 (1982), followed Morgan, but did not preclude review under Scroggins and Parodi if circumstances were presented warranting Scroggins review. A similar result was reached by the Third Circuit in Campbell v. Office of Personnel Management, 694 F.2d 305 (1982). The District of Columbia Circuit sustained Scroggins review of retirement cases in Turner v. Office of Personnel Management, 707 F.2d 1499 (1983), holding[16]:

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16. 707 F.2d at 1502.

> [W]e think that the finality clause of section 8347(c) cannot bear the weight which OPM seeks to place on it. In context, the finality clause is aimed at preserving for OPM or MSPB the exclusive right to determine the underlying factual bases of disability and dependency claims. Thus, the sentence immediately following the finality clause 8347(c) provides that "[t]he Office may direct at anytime such medical or other examinations as it considers necessary to determine the facts concerning disability or dependency of an individual receiving or applying for annuity under this subchapter." 5 U.S.C. 8347(c). In contrast, the judicial review provisions of section 7703 are concerned with far more than the underlying factual basis of the agency's decision. ... Accordingly, the finality clause of section 8347(c) would seem compatible, in context, with judicial review of MSPB disability decisions that were confined to non-factual matters—i.e., restricted solely to review for procedural infirmities or for decisionmaking that was irrational or not in accordance with law.

As to the effect of the 1980 amendments to the retirement legislation, the Court held in Turner[17]:

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17. 707 F.2d at 1503.

The purpose of the 1980 amendment was to prevent involuntary disability retirement proceedings from being misused to force unpopular employees out of active service for reasons of mental incompetency. ... To check against this possibility of misuse, Congress expanded the scope of judicial review beyond the Scroggins level, for this one class of disability determinations, to include the traditional "substantial evidence" review of section 7703. ... Given that the sole purpose of the amendment was to expand judicial protection of employees through review of factual findings in a certain subset of cases, it hardly follows that Congress negatively implied its intent to strip employees of Scroggins-type review in other cases. To the contrary, the committee report accompanying the House-passed version of the amendment expressly acknowledged the viability of Scroggins and its progeny by stating that the "bar to judicial review" which made the amendment necessary was that articulated by the Court of Claims in Scroggins. ... This view, moreover, was confirmed by the Director of OPM himself, who wrote to Congress at the time of the amendment's consideration:

We believe that it is reasonable and proper to restrict expanded judicial review to voluntary disability retirements. ... It is appropriate, therefore, that OPM decisions on voluntary applications be conclusive, reviewable only to determine whether there has been substantial procedural

> error, misconstruction of governing legislation, or some like error going to the heart of the administrative determination.

The reluctance of the judiciary to proscribe any judicial review reflects regard for the extraordinary importance of disability determinations to employees and a similar regard for Supreme Court pronouncements establishing a presumption of the availability of judicial review of federal administrative determinations. See Association of Data Processing Service Organizations v. Camp, 397 U.S. 150, 157 (1970); Barlow v. Collins, 397 U.S. 159, 166 (1970); Abbott Laboratories v. Gardner, 387 U.S. 136, 141 (1967); Rusk v. Cort, 369 U.S. 367, 379-80 (1962). Courts would not lightly disturb review rights known to a Congress long solicitous of judicial protection of retirement benefits. See 29 U.S.C. 1132 (Employee Retirement Income Security Act of 1974); 45 U.S.C. 228k, 45 U.S.C. 355(f) (Railroad Retirement Act of 1937).

The majority decision of the Federal Circuit

denying judicial review is disputed by four members of that Court as well as five other circuit courts and the Court of Claims. Judicial review should not be denied to an entire class of federal employees on so slender a reed. Furthermore, the disinclination of the Federal Circuit to review MSPB retirement decisions will lead to the anomalous result that individuals will seek to use non-statutory Administrative Procedure Act review to avoid the Federal Circuit. Non-statutory review will create a result contrary to the intent of the Federal Courts Improvement Act[18]: instead of federal personnel litigation becoming centralized in the Federal Circuit, litigation will again become fragmented among the district courts, with conflicts reflecting the circuit division prior to the creation of the Federal Circuit. The tendency toward fragmented personnel litgation has already begun following Williams v. Department of the Army, 715 F.2d

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18. Senate Report on P.L. 97-164: 1982 USCCAN at 11-14 (2d Sess., Vol. 2).

1485 (Fed. Cir. 1983), in which the Federal Circuit eschewed jurisdiction of appeals from MSPB decisions involving issues of discrimination.

The significance of the interests of the many employees who claim, or who seek to retain, disability retirement annuities, the conflict among the circuits that have considered the issue of judicial review of retirement determinations, the error in the result reached by the Federal Circuit, and the division likely to recur among the circuits resulting from non-statutory review are considerations warranting review by this Court of the decision below.

CONCLUSION

For these reasons a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Federal Circuit.

Respectfully Submitted,

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Of Counsel:

Peter B. Broida

APPENDIX

Note: This opinion will not be published in a printed volume because it does not add significantly to the body of law and is not of widespread legal interest. It is a public record. It is not citable as precedent. The decision will appear in tables published periodically.

United States Court of Appeals for the Federal Circuit

HOWARD A. DANIEL,	)	Appeal No.
	)	83-1354
	)	
Petitioner,	)	
	)	
v.	)	
	)	
OFFICE OF PERSONNEL MANAGEMENT,	)	
	)	
	)	
Respondent.	)	

DECIDED: February 17, 1984

Before BALDWIN and KASHIWA, Circuit Judges, and COWEN, Senior Circuit Judge.

BALDWIN, Circuit Judge.

DECISION

The above-captioned appeal is dismissed for lack of jurisdiction.

OPINION

This appeal is from a final decision of the Merit System Protection Board (board) affirming the denial of disability retirement benefits by the Office of Personnel Management (OPM). The source of petitioner's disability is a physical injury alleged to have occurred while petitioner was performing duties for the government.

With regard to disability retirement applications, this court has jurisdiction only over appeals of involuntary mental disability cases. Henderson v. Office of Personnel Management, No. 83-1139 (Fed. Cir. Dec. 21, 1983). Petitioner's suggestion that his application for dis-

ability retirement for physical reasons was involuntary, is therefore irrelevant. The above-captioned case is therefore dismissed.

UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION BOARD

HOWARD A. DANIEL	
v.	DOCKET NUMBER PH831L8210614
OFFICE OF PERSONNEL MANAGEMENT	
CSA 2 269 209	

ORDER

Having fully considered the appellant's petition for review of the initial decision issued on February 9, 1983, and finding that it does not meet the criteria for review set forth at 5 C.F.R. Section 1201.115, the Board hereby DENIES the petition.

This is the final order of the Merit Systems Protection Board in this appeal. The initial decision shall become final

five (5) days from the date of this order. 5 C.F.R. Section 1201.113(b).

The appellant is hereby notified of the right under 5 U.S.C. Section 7703 to seek judicial review of the Board's action by filing a petition for review in the United States Court of Appeals for the Federal Circuit, 717 Madison Place, N.W., Washington, D.C. 20439. The petition for judicial review must be filed no later than thirty (30) days after the appellant's receipt of this order.

FOR THE BOARD:

July 6 1983
(Date)

Robert E. Taylor
Secretary

Washington, D.C.

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
PHILADELPHIA REGIONAL OFFICE

HOWARD A. DANIEL

v.

OFFICE OF PERSONNEL MANAGEMENT

Initial Decision Number: PH831L8210614
Date: 09 FEB 1983

INTRODUCTION

On July 31, 1979, Howard A. Daniel signed his application for disability retirement. On June 23, 1982, the Office of Personnel Management stated that it had reconsidered its initial decision disapproving Mr. Daniel's application and concluded that its decision was correct. (Tab 3). On July 13, 1982, Mr. Daniel appealed the denial to the Merit Systems Protection Board. On November 9, 1982, a

hearing was held, at the conclusion of which the record was closed in this matter.

JURISDICTION

Under 5 U.S.C. Sections 1201(a)(1) and 7701(a), the Merit Systems Protection Board has jurisdiction over any action appealable to the Board under any law, rule, or regulation. Both the law, 5 U.S.C. Section 8347(d) and OPM regulations, 5 C.F.R. Sections 831.110 and 831.1205, authorize appeals to the Board from reconsideration decisions by OPM sustaining the disallowance of applications for disability retirement. See also 5 C.F.R. Sections 1201.36(a)(6) and (8). The record in this case shows that OPM did issue a reconsideration decision sustaining its earlier denial of appellant's application for disability retire-

ment benefits, and that appellant thereafter timely filed his appeal. The record also shows that at the time the appellant signed his application for disability retirement he had been a federal employee for approximately 15 years. (Tab 3). Accordingly, the Board has jurisdiction to adjudicate this appeal.

ANALYSIS AND FINDINGS

The issue presented by this appeal is whether appellant is totally disabled for useful and efficient service as a Distribution Clerk at the United States Postal Service, Washington, D.C. Under 5 U.S.C. Section 8337(a), an employee who completes five years of civilian service and is found disabled shall be retired upon his or her own application. Under 5 U.S.C. Section 8331(6) "disabled" is defined as:

> "disabled" and "disability" means totally disabled or total disability, respectively, for useful and efficient service in the grade or class of position last occupied by the employee or member because of disease or injury not due to vicious habits, intemperance, or willfull misconduct on his part within five years before becoming so disabled. 1/

Since appellant has 15 years of creditable service, the five-years service requirement for retirement is satisfied. There is neither an assertion nor any evidence that his claimed disability is due to "vicious habits, intemperance, or willfull misconduct". The only remaining issue, thus, is whether by reason of his

medical problems appellant is unable to perform useful and efficient service as a Distribution Clerk.

In Chavez v. Office of Personnel Management, MSPB Docket No. DA831L09003 (May 28, 1981), the Board held that in an appeal from an adverse OPM decision on a voluntarily-initiated application for disability retirement, the employee/appellant bears the burden of persuasion by a preponderance of the evidence. 2/

The ultimate determination of total disability is to be based upon the probative value of all of the evidence, taking into account: (1) objective clinical findings; (2) diagnoses and expert medical opinions; and (3) subjective evidence of pain and disability together with, (4) all

evidence relating to the effect of the appellant's condition upon his or her ability to perform in the grade or class of position last occupied. Chavez, Id. at 9.

In his application for retirement, appellant stated that his disabilities consist of "Poly-Arthritis, Duodenal Ulcers, Hypertrophic Antral Gastritis, Hiatal Hernia w/Gastro-Esophageal reflux, Chronic Constipation, Nervous Tension and Severe Back Sprain." (Tab 3). He further stated that his ailments restrict his movements and that he became "total(ly) disabled" on September 28, 1978. Id. On November 14, 1979 (approximately 3 1/2 months after appellant signed his application), OPM's Staff Medical Office (Dr. B. H. Prats) informed appellant of the

necessary evidence and information to verify a diagnoses and requested he submit additional reports for which he was allowed 30 days to submit. Id. On November 27, 1979, appellant informed OPM that his personal physician (Dr. Charles F. Adams) submitted to OPM all the information and reports available in his files concerning appellant's disability retirement; appellant then submitted to OPM a radiology report from Dr. T. Wilkins Davis, dated January 7, 1977 and x-rays which he had in his possession.

On December 10, 1979, OPM arranged for appellant to be examined by Dr. Edward W. Youngblood. (Tab 3). In its request to Dr. Youngblood to examine appellant, OPM informed him of the alleged disabilities and specifically requested a narrative

report of his findings, diagnoses and opinion as to whether the appellant is totally disabled for the job occupied. Id. On December 17, 1979, Dr. Youngblood examined appellant and on January 10, 1980, he submitted his report to OPM.

In his report, Dr. Youngblood states that appellant's chief complaint was "generalized arthritis and ulcers". (Tab 3). According to Dr. Youngblood's report, appellant stated that he has been unable to continue a full work schedule because of his arthritis.

In regard to appellant's alleged back problem, Dr. Youngblood reported:

> X-ray of the right knee and hip, both hands and lumbo-

sacral spine approximately 9 months ago, at the Washington Hospital Center, showed no radiologic evidence of arthritis. He has not worked since October 1978, when he had acute low back pain and spasm while at work. He was treated with Motrin, Analgesics, moist heat and bed rest. Medication has been taken only rarely (1-2 doses) in the past six months...There is tenderness of right Sacroiliac with a tender 1/2 Cm osteoarthritic nodule present. Flexion and extension of spine was within normal range, fingers reach the floor and all head maneuvers are normal...

In regard to appellant's alleged gastrointestinal problem, Dr. Youngblood reported:

> Ulcer symptoms developed in 1977; X-ray showed new ulcer activity in addition to old duodenal scars. The presence of a hiatal hernia was not mentioned. He was successfully treated with ulcer regimen. No specific ulcer symptoms have occurred for over one year. For the past 25 years he has had what is apparently acute gastritis and reflex esophagitis after more than two cups of coffee or one ounce of whiskey (but he can take Motrin and Salicylates).

In summary, Dr. Youngblood stated that based upon the appellant's history his arthritic and gastrointestinal symptoms could be more aggressively treated, 3/ and concluded that appellant was not totally disabled.

On or about March 3, 1980, appellant received OPM's decision for disallowance. On March 13, 1980, appellant requested from OPM reconsideration of its initial decision and an extension of 30 days to submit additional information. On April 7, 1980, OPM acknowledged receipt of appellant's request for reconsideration and informed him that it would consider his request. On May 20, 1980, OPM's Medical Director, Dr. George M. Smith, granted appellant 30 days to submit additional information. On June 30, 1980, OPM

granted appellant another 30 days to submit additional information.

On January 31, 1982, appellant informed OPM's Medical Director of his disagreement with Dr. Youngblood's findings and submitted a list of exceptions. In his January 31st communication, appellant essentially submits that Dr. Youngblood's report 1) was biased; 2) ignored his back injury; 3) was inaccurate with respect to his being able to take Motrin and Salicylates as there was no evidence to support such a finding, and 4) produced no new evidence. (Tab 3). Appellant also submitted that Dr. Charles F. Adams' report "nullifies" Dr. Youngblood's conclusions that he could return to either of the two jobs he held with the Post Office. 4/ Together with his January

31st letter to OPM, appellant submitted a copy of a medical report from Dr. Francis L. Smith to an individual identified as "Attorney Maurice Burstein," dated November 3, 1981. (Tab 3).

Dr. Francis L. Smith's report reveals that Dr. Charles Adams referred the appellant to him for consultation after his alleged injury while working for the Post Office on September 28, 1978. Dr. Smith stated that he examined appellant on December 18, 1978, and his findings were as follows:

> The patient complained of continuing soreness in the lower back. He stated the pain radiated from the lower back to the right buttock and down the posterior aspect of the right

leg. There was tenderness to pressure over the right sacroiliac joint. Discomfort was noted on extension and lateral flexion of the lumbar spine. In the standing position, he could reach to approximately mid-tibia with his findertips complaining of pain in the back when he attempted to reach further. Straight leg raising and Laseque's sign were negative. There was no measurable atrophy of the lower extremities. (Tab 3).

Dr. Smith stated that x-rays were taken of appellant's lumbosacral spine which revealed no evidence of a fracture. In commenting upon his impression that ap-

pellant sustained a sprain of the lower back resulting from an accident which occurred on September 28, 1978, Dr. Smith suggested that appellant:

> ...continue with the care of Dr. Adams and receive the necessary therapy treatments and medications for pain and muscle spasm. In all probability, the symptoms of which this patient compains of are in part due to an aggravation of a pre-existing arthritic condition for which I treated him in 1976....Id.

On June 23, 1982, OPM informed appellant that it reconsidered its initial decision and the medical evidence received by OPM prior to and after appellant's request

for reconsideration. In its reconsideration of its initial decision, OPM stated essentially that (1) no objective pathology was found that would cause such severe symptoms that are not controllable and amenable to appropriate management and treatment, (2) there was no specific evidence of deficient job performance because of Superior Officer's Report was not completed, (3) Dr. Charles F. Adams' report on the Standard Medical History and Examination Form #2801-B did not contain any documentation of his findings regarding his diagnosis, 5/ (4) the problems reported in Dr. T. Wilkins Davis' x-ray diagnostic summary, 6/ are amenable to treatment and with patient compliance would not cause severe symptoms that would be disabling, (5) Dr. Youngblood was justified in his diagnosis 7/ (6) Dr.

Francis L. Smith's medical report did not document any findings that would be expected to result in total disability, and (7) that Dr. Smith made reference to appellant having had x-rays taken at the Veterans Administration Hospital in Washington, D.C., but without any VA medical evidence. OPM concluded that the documentation does not support a medical condition which warrants appellant being restricted from his job and that the evidence does not support a conclusion that he has a medical condition which has caused a deficiency in service or, in the absence of a documented service deficiency, shown that his condition is incompatible with either useful service or retention in the position. (Tab 3).

In his appeal letter, dated July 10, 1982, and received by the Board's Philadelphia Regional Office on July 13, 1982, appellant based his appeal essentially upon the arguments that (1) OPM ignored his treating physician's reports, his severe back injury, and the diagnosis of sciatica, and his having been assigned to light duty for one and one half years, (2) in the past four years his treating physicians have not given him a "back to work clearance," and (3) Dr. Youngblood's report was biased.

During the hearing, appellant had an opportunity to fully present his arguments and any additional evidence. Appellant submitted at the hearing the additional arguments that he is not qualified for the job to which OPM says

he can return, and that regulations and a Collective Bargaining Agreement prevent him from returning to the position he most recently held with the agency. In support of his position, appellant introduced additional exhibits into evidence during the presenation of his case. However, even with the additional arguments and exhibits, appellant's case is not significantly different than what it was prior to the time he filed his appeal.

The record shows that on August 24, 1977, Dr. Charles F. Adams reported having treated appellant for ailments which he believed would affect his work performance (Tab 7, Exhibit 28). 8/ However, Dr. Adams' report is not supported by any objective clinical findings or medical

documentation. Moreover, the evidence shows that Dr. Adams did not consider appellant to be totally disabled for purposes of disability retirement. On January 3, 1978, Dr. Adams stated that appellant was able to continue working at the agency with some limitations. 9/ The evidence shows that even before Dr. Adams recommended appellant be placed on light duty, the agency had granted appellant his request for a light duty assignment.

The record shows that effective September 1, 1977, appellant was detailed to limited duty restricting his lifting to 20 pounds and limiting standing and walking. (Tab 7, Exhibit 8). The limited duty detail was to end on September 30, 1977. Id. Appellant was granted an opportunity to request a renewal of this

limited duty before the termination of the detail. Id. The record shows that the agency renewed appellant's limited duty detail until September 28, 1978, appellant's last workday with the agency and the date when his alleged back injury occurred. (Tab 7, Exhibits 9, 14, 15, 16, and 17).

Although appellant appears to have been accommodated by being placed in a limited duty assignment for approximately one year, the evidence reveals that there has been no medical recommendation to place appellant in a permanent light duty assignment. Indeed, the evidence shows that the agency's Medical Officer, Dr. Clive E. Jackson, evaluated the medical data from appellant's private physician and while he specifically recommended

against placing appellant in a permanent light duty status, 10/ he recommended that appellant be transferred from a Carrier Craft to Clerk Craft regular duty assignment. 11/ The craft change was made effective November 5, 1977. (Tab 7, Exhibits 10 and 14). The temporary light duty assignments the agency granted the appellant, even after the craft change, were granted with the understanding that appellant would return to his regular duties. 12/

The evidence shows that appellant's alleged back injury of September 28, 1978, if related to his job, could have occurred while he was in his clerk craft position. Appellant testified that he was at his job in the agency's Main Post Office Building, Washington, D.C. when he

strained his back while sitting in a straight back chair, bending down to pick up fallen mail and twisting to place it in a slot immediately behind him. 13/ He also testified that from the alleged injury, he felt a pain which Dr. C. Adams diagnosed as severe back strain. 14/ It is because of this alleged back condition that appellant asserts he is unable to return to work. 15/ Appellant's testimony regarding the severity of his back condition is inconsistent with a significant portion of the evidence of record.

The record reveals uncontested evidence that appellant has been working without any difficulty as a taxicab driver since at lease 1980. 16/ The evidence shows that appellant has been successfully treated for his ailments, particularly

his back and arthritic problems, however his progress may more than likely have been stifled because of his refusal to properly follow his prescribed treatment. Appellant testified that he has medication which removes the pain from which he alleges he suffers, but refuses to take it even though it is prescribed by his attending physician. 17/ Notwithstanding appellant's refusal to take medication, the record shows that appellant does not have the pain which he asserts he had at the time of the alleged back injury on September 28, 1978.

During the hearing which lasted several hours, I observed appellant standing, sitting, twisting and bending in the course of presenting his case and he did not appear to experience any pain or

difficulty. When I asked him about his alleged problem in standing or sitting for a prolonged period of time, appellant acknowledged that he had been standing a long time without any problem. 18/ In addition to having observed appellant pain-free during the hearing, I found evidence that appellant has not experienced his alleged back pain for a significant period of time.

Appellant testified that his back pain "went away" when Dr. C.F. Adams treated him for his alleged back injury of September 28, 1978. The evidence shows that although appellant applied for medical care on August 12, 1981 at the Veterans Administration Medical Center and complained of chronic back pain, he denied having any pain at that time. 19/

In Wagoner v. Office of Personnel Management, MSPB Docket No. AT831L09018 at 3 (July 28, 1981) the Board noted:

> As is often the case, the medical reports, supporting the appellant's application, diagnose the appellant's problem, mention that pain is an attendant symptom, and then conclude that the appellant is totally disabled. Reports of this nature are not persuasive because they do not explain exactly how the appellant's particular condition renders him totally disabled...Such reports fail to answer the logical questions of whether it is the pain alone which is disabling, whether the pain can be controlled to the

> extent that the appellant can continue working, or whether the appellant may be disabled by pain on some occasions but able to work on others...

See also Shepherd v. Office of Personnel Management, MSPB Docket No. SF831L8110670 (March 17, 1982).

Appellant's complaint of pain is vague and inconsistent. The evidence shows that any pain which appellant may have experienced from his alleged back injury of September 28, 1978 was at its peak at that time and has not repeated since then. The evidence also shows that any pain or back difficulty appellant may have is neither continuous nor predictable. His claim of having back pain when

he sits, stands or walks for a prolonged period of time is inconsistent with certain evidence of record. Moreover, there is evidence that connects his alleged back difficulty with his arthritic condition which is controllable and capable of being successfully treated by medication. (Tab 3; See infra fn. 17). 20/

In addition to appellant not being able to establish through the evidence of record that he is totally disabled, he has not shown total inability to perform the work of a Distribution Clerk or a job in a similar class and grade. See D'Agostino v. Office of Personnel Management, MSPB Docket No. 831L8110196 (May 24, 1982) at 3.

During the hearing appellant submitted, that another reason for his not being able to return to work with the agency is that he was not qualified for the reassignment from Carrier Craft to Clerk Craft and that the reassignment was not in accordance with the Collective Bargaining Agreement (CBA) between the union and agency. These arguments, however, are not persuasive when viewed in light of the facts of the instant case.

Appellant based his argument of not being qualified for the reassignment primarily on 5 C.F.R. Section 831.502 which provides, in relevant part:

> "Disabled" and "disability" mean unable or inability to render useful and efficient

> service because of disease or injury (1) in the employee's current position; or (2) in a vacant position in the same agency at the same grade or pay level for which the individual is qualified for reassignment. For the purpose of the preceding sentence, an employee of the United States Postal Service shall be considered not qualified for a reassignment if the reassignment is to a position in a different craft or is inconsistent with the terms of a collective bargaining agreement covering the employee.

In support of his position that the reassignment was "inconsistent with the terms

of a collective bargaining agreement covering" his employment, appellant submitted into evidence a copy of part of the CBA in effect between July 21, 1972 to July 20, 1978. (Tab 7, Exhibit 32). The two provisions 21/ appellant relied upon read as follows:

> 2. The full-time regular or part-time flexible employee must be able to meet the qualifications of the position to which he is reassigned on a permanent basis. On a temporary reassignment, qualifications can be modified provided excessive hours are not used in the operation.

4. The reassignment of a full-time regular or part-time flexible employee under the provisions of this Article to an agreed upon light duty temporary or permanent or other assignment within the office, such as type of assignment, area of assignment, hours of duty, etc., will be the decision of the installation head who will be guided by the examining physician's report, employee's ability to reach his place of employment and ability to perform the duties involved.

In support of his position that he did not "meet the qualifications of the position to which he is reassigned on a per-

manent basis" (see CBA provision number 2 above), appellant also submitted Sections 353.331 and 354.236(a) from the Employee and Labor Relations Manual. (Tab 7, Exhibits 20 and 21). These sections read as follows:

> .331 Temporary assignment of an employee to a position at the same grade or at a lower grade may not exceed 90 calendar days, which may be extended by the next higher level of management above the appointing official. See 353.34 for time limits on temporary assignment to a higher-grade position.

.236 Qualification and Eligibility Requirements

a. An employee must meet the prescribed minimum qualification requirements for the position to which assigned under this procedure. The Regional Director, E & LR, may waive the minimum requirements in individual cases where there is evidence that the employee can be expected to satisfactorily perform the duties of the position within 90 days after assignment. A written record is maintained which states the specific reasons for granting any such waiver.

I find that appellant's notion that OPM's decision denying his application for disability retirement contravenes the

referenced regulations is without force in the instant case. Appellant relies upon 5 C.F.R. Section 831.502 as his foundation for invoking the other referenced authorities. Just as 5 U.S.C. Section 8337 was amended to include a specific provision relating to U.S. Postal Service employees (see infra fn. 1), so was 5 C.F.R. Section 831.502. See 46 Fed. Req. 16654, March 13, 1981, as amended to 46 Fed. Reg. 54497, November 3, 1981.

Prior to its amendment in 1981, 5 C.F.R. Section 831.502 did not contain the relevant provision upon which appellant relies. Since appellant filed his application for disability retirement prior to the effective date of the amendment of the regulation, the current regulation is

inapplicable. See Morgan v. Office of Personnel Management, supra; Komarek v. Office of Personnel Management, supra. See also 46 Fed. Reg. 16654 supra.

In regards to the other referenced provisions appellant submits as a basis for his not returning to the reassignment position, appellant has presented no evidence that he is not qualified as is apparently required by said provisions.

In Bruno v. Office of Personnel Management, MSPB Docket No. AT831L8110280 (April 1, 1982), the Board held that the appellant (a city letter carrier with the U.S. Postal Service) failed to establish that modification of his duties was not possible, or that he was not qualified for reassignment, or that the only duties

he could perform were those of another craft, or that necessary reassignment would be inconsistent with the terms of a collective bargaining agreement covering his employment. Id. at 7. I find that the appellant in this instant case, like the appellant in Bruno, has not met his burden of persuasion that he is entitled to a disability retirement annuity. But unlike Bruno, where there was evidence that appellant could not carry out the duties of his job, he had constant back pain and his problem had been progressive over the years, appellant in the instant case has not shown that he could not perform the duties in his class or grade, his alleged back problem and other ailments were constant or disabling, and his alleged back pain has worsened.

Assuming arguendo that appellant could establish that he could not "meet the prescribed minimum qualification requirements for the position" to which he was reassigned as required by E & LR Manual, Section 354.236, appellant has not shown that he was or is unable to satisfactorily perform the duties of said position. 22/ Id. Moreover, the referenced position also allows for the minmum requirements to be waived by the Regional Director in individual cases (Id.), and appellant has not shown that such a waiver could not be obtained if necessary. The record reveals that appellant had functioned for almost one year in the same craft position for which he now claims he is not qualified. (Tab 7, Exhibits 14 and 16).

Finally, in regard to appellant's contention that Dr. Youngblood was biased in his report of his examination of appellant on December 17, 1979, I find that appellant has not presented any proof to support such an allegation. Not only has there been no showing of bias on the part of Dr. Youngblood toward appellant, but the record establishes that Dr. Youngblood's findings and opinions were corroborated to a significant extent by some of appellant's attending physicians. (Tab 3; Tab 7, Exhibits 29 and 30).

Having considered all of appellant's arguments and evidence, I must find that appellant has not shown, by a preponderance of the evidence, that he is totally disabled within the meaning of 5 U.S.C.

Section 8331(6). Accordingly, OPM's decision must be sustained.

DECISION

The Office of Personnel Management's decision denying appellant's claim for disability retirement is sustained.

NOTICE

This decision is an initial decision and will become a final decision of the Merit Systems Protection Board on 16 March 1983 unless a petition for review is filed with the Board or the Board reopens the case on its own motion.

Any party to this appeal, the Director of the Office of Personnel Management, or

the Special Counsel may file a petition for review of this decision with the Merit Systems Protection Board. The petition for review must set forth specific objections to the initial decision, supported by references to applicable laws or regulation, and with specific reference to the record. The petition for review must be filed with the Secretary to the Merit Systems Protection Board, Washington, D.C. 20419, no later than the date set forth above.

After providing an opportunity for response by other parties, the Board may grant a petition for review when it is established that:

(1) New and material evidence is available that, despite due diligence, was not available when the record was closed; or

(2) The decision of the Presiding Official is based on an erroneous interpretation of the statute or regulation.

Pursuant to 5 U.S.C. Section 7703(b)(1) 23/, the appellant has the right to seek judicial review of the Board's final decision on this appeal. A petition requesting such review must be filed with the United States Court of Appeals for the Federal Circuit no later than thirty (30) days after appellant's receipt of the Board's final decision or order.

For the Board:

Juan J. Laureda, Presiding Official

1/ This definition was repealed on December 5, 1980 by Pub. L. No. 96-499 and a new definition of disability was incorporated into 5 U.S.C. Section 8337(a) which became effective on March 5, 1981 (90 days after the enactment date of the act), Pub. L. No. 96-499, Title IV, Section 403(b), 94 Stat. 2606. The new definition is not applicable to the present case as it was not in effect at the time the applicant submitted his application for disability retirement. See Morgan v. Office of Personnel Management, 675 F.2d 196, 197, n. 2 (9th Cir. 1982); Komarek v. Office of Personnel Management, MSPB Docket No. CH831L811024 (April 14, 1982); see also 46 Fed. Reg. 16654 (March 13, 1981).

2/ "Preponderance of the evidence" means "(t)hat degree of relevant evidence which a reasonable mind, considering the record as a whole, might accept as sufficient to support a conclusion that the matter asserted is more likely to be true than not true." 5 C.F.R. Section 1201.56(c)(2).

3/ Dr. Youngblood stated that within a six month period prior to the December 10, 1979 examination, appellant had taken medication twice. (Tab 3).

4/ The records show that appellant had been a Mail Carrier prior to his reassignment to a Clerk position. (Tab 3).

5/ In the sections labeled, "Physical Findings" and "Diagnosis", apparently completed by Dr. Adams', the following was written in: "Chronic neck sprain, chronic back sprain, peptic ulcer, hiatal hernia, plus nervous tension". This document is dated July 31, 1979. (Tab 3).

6/ Dr. Davis' impression of the referenced x-rays was: 1) small hiatal hernia with gastro-esophageal reflux, 2) hypertrophic antral gastritis, and 3) two duodenal ulcers. (Tab 3).

7/ Dr. Youngblood's diagnosis was 1) osteoarthritic, grade I and 2) hypertrophic gastritis, recurrent with one documented duodenal ulcer. (Tab 3). In its reconsideration letter, OPM stated "(a)n osteo-arthritis of this mild degree is very common in the general population in (appellant's) age group and older. The gastrointestinal conditions, and the gastritis are not shown to be of disabling severity when managed appropriately with patient complaince." (Tab 3).

8/ In his report, Dr. Adams stated that the ailments for which he treated appellant were 1) two duodenal ulcers, 2) hypertrophic antral gastritis, 3) hiatal hernia with gastro-esophageal reflux, 4) chronic constipation, 5) nervous tension, and 6) poly-arthritis. In commenting on these ailments he stated: "(t)here is no doubt in my mind, that Mr. Daniel will not be able to measure up to his usual

standard of work anytime in the foreseeable future because of the above-mentioned ailments." (Tab 7, Exhibit 28).

9/ In a letter, dated January 3, 1978, from Dr. Charles F. Adams, addressed "TO WHOM IT MAY CONCERN," Dr. Adams made reference to his August 24, 1977 letter and recommended that appellant be given essentially "...a light duty schedule that will allow limited standing, walking, and a maximum lifting (sic) approximately 20 lbs...." (Tab 7, Exhibit 13).

10/ In his statement to the agency's Director of Employee and Labor Relations, dated September 26, 1977, Dr. Jackson said: "...inasmuch as the applicable pathological plethora is therapeutically approachable with expectancy, candidacy for permanent light duty status therefore, is not recommended." (Tab 7, Exhibit 6).

11/ Dr. Jackson said: "(c)onversion from Carrier Craft to Clerk Craft would, in my judgment, permit regular duty performance." (Tab 7, Exhibit 6).

12/ In a memorandum, dated January 9, 1978 from the agency's Manager of Employee Relations, D.B. Robinson, to the appellant, appellant was informed that the reassignment was "...based on (his) ability to perform the full duties of the clerk craft to which (he was) assigned." (Tab 7, Exhibit 14). In granting him a temporary light duty assignment, Mr. Robinson stated:

"(i)t is anticipated that (he) will soon be able to return to (his) regular duties." Id.

13/ Dr. James C. Cobey, one of appellant's attending physicians, reported his examination of appellant at the time of the alleged injury to the U.S. Department of Labor, Office of Workers' Compensation Programs. In his report, dated July 30, 1980, Dr. Cobey reports appellant stated "...he leaned over from his chair to lift a heavy tray and twisted and strained his back." (Tab 7, Exhibit 30).

14/ This testimony is corroborated to a certain extent by a report from Dr. Charles F. Adams to the U.S. Department of Labor, Office of Federal Employees' Compensation, dated April 30, 1979. In his report, Dr. Adams presented his diagnosis as "(s)evere sprain of the back." (Tab 7, Exhibit 2).

15/ Appellant testified that one of the reasons he did not return to his job was because he did not get a release from any of his doctors. Dr. N. Berry, a physician at the Veterans Administration Medical Center, Washington, D.C., reported examining appellant on August 12, 1981 and stated: "(patient) is employed as a taxi driver." (Tab 7, Exhibit 31 at 5).

16/ In two separate reports to the U.S. Department of Labor, Office of Workers' Compensation Programs, Dr. Cobey (see infra fn. 13) stated that

appellant "obviously (was) able to function as a cab driver" and "drive without any difficulty". (Tab 7, Exhibits 29 and 30).

17/ In his testimony, appellant stated that one of the medications which relieves his pain is "Motrin". Motrin is indicated for relief of the signs and symptoms of rheumotoid arthritis and osteoarthritis. It is a non-steroidal anti-inflammatory agent that possesses analgesic and antipyretic activities. The anti-inflammatory action of Motrin has been shown by reduction in joint swelling, reduction in pain, reduction in duration of morning stiffness, reduction in disease activity; and by improved functional capacity as demonstrated by an increase in grip strength, a delay in the time to onset of fatigue, and a decrease in time to walk 50 feet. See Physicians' Desk Reference, 36th edition, 1982, at 1959.

18/ Appellant also testified that he believed "there is a possibility" the pain could return. This, however, is speculative as there is no clear evidence to support such a prediction with any reasonable certainty.

19/ The V.A. Medical Certificate, dated August 12, 1981, reports in relevant part, appellant having a "(history) of back injury 1971 and 1978 while employed at post office. Suit pending. Denies pain at this time. (R)equesting to see orthopedist." (Tab 7, Exhibit 31 at 4).

20/ Cf. Adams v. Office of Personnel Management, MSPB Docket No. PH831L8110132 (February 3, 1982) where OPM based its denial of disability on its finding that appellant's condition was amenable to treatment and control, and the Board stated that such a finding was speculative in nature. Id. at 5. Unlike Adams where there was evidence that the employee's disabling condition worsened even with treatment (Id. at 4), the evidence in the instant case shows that appellant's back problem was not worse since the date of his alleged injury and that mediciation and treatment would improve his condition.

21/ Appellant testified that the two provisions to which he refers are from Article XIII, Seccion D, General Policy Procedures.

22/ The Superior Officer's Statement relating to appellant's actual performance was blank. Appellant failed to provide any evidence on how his alleged condition affected his work performance.

23/ As modified by Section 127 of the Federal Court Improvement Act of 1982, to be codified at 28 U.S.C. Section 1295(a)(9).

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

HOWARD A. DANIEL,

Petitioner No. 83-1354

v. PH831L8210614

OFFICE OF PERSONNEL MANAGEMENT,

Respondent.

JUDGMENT

ON APPEAL from the Merit Systems Protection Board

This CAUSE having been heard and considered, it is ORDERED and ADJUDGED: DISMISSED, for lack of jurisdiction.

DATED February 17, 1984

ENTERED BY ORDER
OF THE COURT
George E. Hutchinson,
Clerk

Petition for rehearing,
Denied, March 6, 1984,
Suggestion for rehearing
In Banc, Declined,
March 6, 1984

ISSUED AS A MANDATE: MARCH 12, 1984

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

HOWARD A. DANIEL,

Petitioner

v. No. 83-1354

OFFICE OF PERSONNEL MANAGEMENT,

Respondent.

ORDER

A petition for reharing and a suggestion for rehearing in banc having been filed in this case,

UPON CONSIDERATION THEREOF, it is Ordered by the court that the petition for rehearing be, and the same is hereby, Denied.

The suggestion for rehearing in banc is declined.

FOR THE COURT

George E. Hutchinson, Clerk

March 6, 1984

5 U.S.C. 8347:

(c) The Office shall determine questions of disability and dependency arising under this subchapter. Except to the extent provided under subsection (d) of this section, the decisions of the Office concerning those matters are final and conclusive and are not subject to review. The Office may direct at any time such medical or other examinations as it considers necessary to determine the facts concerning disability or dependency of an individual receiving or applying for annuity under this subchapter. The Office may suspend or deny annuity for failure to submit to examination.

(d)(1) Subject to paragraph (2) of this subsection, an administrative action or order affecting the rights or interests of an individual or of the United States under this subchapter may be appealed to the Merit Systems Protection Board under procedures prescribed by the Board.

(2) In the case of any individual found by the Office to be disabled in whole or in part on the basis of the individual's mental condition, and that finding was made pursuant to an application by an agency for purposes of disability retirement under section 8337(a) of this title, the procedures under section 7701 of this title shall apply and the decision of the Board

shall be subject to judicial review under section 7703 of this title.

5 U.S.C. 7701:

Appellate Procedures

(a) An employee, or applicant for employment, may submit an appeal to the Merit Systems Protection Board from any action which is appealable to the Board under any law, rule, or regulation. An appellant shall have the right—

(1) to a hearing for which a transcript will be kept; and

(2) to be represented by an attorney or other representative.

Appeals shall be processed in accordance with regulations prescribed by the Board.

5 U.S.C. 7703:

Judicial Review of Decisions of the Merit Systems Protection Board

(a)(1) Any employee or applicant for employment adversely affected or aggrieved by a final order or decision of the Merit Systems Protection Board may obtain judicial review of the order or decision.

...

(b)(1) Except as provided in paragraph (2) of this subsection, a petition to review a final order or final decision of the Board shall be filed in the United States Court of Appeals for the Federal Circuit. Notwithstanding any other provision of law, any petition for review must be filed within 30 days after the date the petitioner received notice of the final order or decision of the Board.

(2) Cases of discrimination subject to the provisions of section 7702 of this title shall be filed under section 717(c) of the Civil Rights Act of 1964 (42 U.S.C. 200e-16(c)), section 15(c) of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 633a(c)), and section 16(b) of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 216(b)), as applicable. Notwithstanding any other provision of law, any such case filed under any such section must be filed within 30 days after the date the individual filing the case received notice of the judicially reviewable action under such section 7702.

(c) In any case filed in the United States Court of Appeals for the Federal Circuit, the court shall review the record and hold unlawful and set aside any agency action, findings, or conclusions found to be—

(1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(2) obtained without procedures required by law, rule, or regulation having been followed; or

(3) unsupported by substantial evidence;

except that in the case of discrimination brought under any section referred to in subsection (b)(2) of this section, the employee or applicant shall have the right to have the facts subject to trial de novo by the reviewing court.

Supreme Court, U.S.
FILED
JUL 26 1984
ALEXANDER L. STEVAS
CLERK

No. 83-2101 (2)

In the Supreme Court of the United States

OCTOBER TERM, 1984

HOWARD A. DANIEL, PETITIONER

v.

OFFICE OF PERSONNEL MANAGEMENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

MEMORANDUM FOR THE RESPONDENT

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MEMORANDUM FOR THE RESPONDENT

Petitioner seeks review of the decision of the court of appeals holding that 5 U.S.C. 8347(c)[1] precludes judicial review of the decision of the Merit Systems Protection Board (MSPB) affirming the denial by the Office of Personnel Management (OPM) of his application for civil service disability retirement benefits. The question whether the court of appeals may review the denial of employee-initiated applications for disability benefits based on

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[1]5 U.S.C. 8347(c) provides:

> The Office [of Personnel Management] shall determine questions of disability * * * arising under this subchapter. Except to the extent provided under subsection (d) of this section, the decisions of the Office concerning these matters are final and conclusive and are not subject to review.

Section 8347(d), as pertinent here, provides for review of OPM decisions only by the MSPB. 5 U.S.C. 8347(d)(1).

physical disability is before the Court in *Lindahl* v. *OPM*, cert. granted, No. 83-5954 (June 18, 1984). As petitioner recognizes (Pet. 6, 16), the court of appeals' decision in this case was based upon its prior decision in *Lindahl*, as applied in the court's intervening decision in *Henderson* v. *OPM*, 724 F.2d 119 (Fed. Cir. 1983). See Pet. App. A2.[2]

It is therefore respectfully submitted that the petition for a writ of certiorari should be held and then disposed of in light of the Court's decision in *Lindahl* v. *OPM*, No. 83-5954.

REX E. LEE
Solicitor General

JULY 1984

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[2]Petitions for a writ of certiorari also are pending in three other cases that were disposed of by the Federal Circuit based upon its decision in *Lindahl*. See *Swanson* v. *MSPB*, petition for cert. pending, No. 83-6034; *Gates* v. *MSPB*, petition for cert. pending, No. 83-6093; *Smith* v. *OPM*, petition for cert. pending, No. 83-6440.

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